

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

STERICYCLE, INC.,)		
)		
Respondent,)		
)		
And)	Case Nos.	04-CA-137660
)		04-CA-145466
)		04-CA-158277
TEAMSTERS LOCAL 628)		04-CA-160621
)		
Charging Party)		

RESPONDENT’S RESPONSE TO NOTICE TO SHOW CAUSE

NOW COMES Stericycle, Inc., Respondent herein, and responds to the Board’s Notice to Show Cause dated January 15, 2019, as follows:

INTRODUCTION

This case is before the Board on exceptions filed by all parties to a decision issued by Administrative Law Judge Michael A. Rosas on November 10, 2016. The parties’ exceptions present issues that can be grouped into the following categories: (1) alleged unlawful unilateral changes, (2) alleged unlawful refusals to furnish information, and (3) alleged unlawful employment policies. On January 15, 2019, the Board issued a Notice to Show Cause “why the complaint allegations involving the maintenance of allegedly unlawful work rules or policies should not be severed and remanded to the administrative law judge for further proceedings consistent with the Board’s decision in *Boeing [Co.]*, 365 NLRB No. 154 (2017), including reopening the record if necessary.”

For the reasons described in greater detail below, Respondent urges the Board either to remand the entire case to the ALJ, or to retain the case in its entirety. Respondent believes that remanding only part of the case will unnecessarily create two proceedings out of one, will not promote judicial economy, and could potentially result in overlapping remedies (dual Notices to Employees). Further, in the event that the case is remanded, ALJ Rosas is well known for issuing prompt decisions. Thus, it is unlikely that there will be any significant delay in finally resolving all issues in dispute. Finally, Respondent anticipates, based on discussions with the General Counsel, that the General Counsel intends, in light of *Boeing*, to alter its position regarding the Use of Personal Electronics in the Workplace Policy and Camera and Video Policy and to take the position that these policies are lawful.

DISCUSSION

A. The Boeing Standard

In *Boeing*, the Board overruled the “reasonably construe” standard established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) for evaluating the lawfulness of facially neutral employment rules and policies. Henceforth, “the Board will evaluate two things: (i) the nature and potential impact on NLRA rights *and* (ii) legitimate justifications associated with the rule.” *Boeing*, *slip. Op.* at 3. Rules will be placed into one of three categories. Category 1 cases include rules that either would not be reasonably interpreted as interfering with §7 rights or where the potential adverse impact on such rights is outweighed by legitimate justifications for the rule. Category 2 cases include rules that require individualized scrutiny to balance the potential adverse impact of the rule on §7 rights against the justifications for the rule. Category 3 includes rules that clearly restrict §7 rights and that lack any justification sufficient to outweigh the impact on §7 rights. *Id.* at 3-4.

When the rule in question would not be reasonably interpreted as interfering with §7 rights, no further balancing or scrutiny is required. *Id.* at 4, 16. Thus, in some cases, “the impact of a particular rule on NLRA rights may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself or the Board’s experience with particular types of workplace issues.” When this is the case, “the Board’s inquiry into the maintenance of the rule comes to an end.” *Id.* at 16. In other cases, the parties “may also introduce evidence regarding a particular rule’s impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings.” *Id.* at 15.

B. All Of The Rules And Policies In Issue Fall Into Category 1. No Remand Is Necessary.

The parties’ exceptions¹ place the following rules/policies in issue:

1. Retaliation [As Part of Harassment Policy]

All complaints [of harassment or retaliation] will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

2. Personal Conduct Policy

In order to protect everyone’s rights and safety, it is the Company’s policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.

....

-- Engaging in behavior which is harmful to Stericycle’s reputation

....

¹ The General Counsel challenges only the highlighted sections of these policies.

3. Conflicts of Interest

Stericycle will not retain a team member who directly or indirectly engages in the following:

- *An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.*
- *An activity in which a team member obtains financial gain due to his/her association with the Company.*
- *An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.*

4. CAMERA USAGE

Team members are prohibited from taking pictures with a personal or company issued camera or cell phone camera of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.

5. VIDEO AND TAPE RECORDING

Team members are prohibited from taking video or audio recordings with a personal or company camera, camcorder, or other device of any Stericycle property, operation, or equipment without the permission of their supervisor/manager.

6. Personal Electronics

The use of personal cell phones or other personal electronic devices such as MP3 players is prohibited in waste processing, warehouse, loading and unloading areas during operating hours and any areas subject to vehicle movement at any time. The following are some examples of personal electronic devices, however this list is not all inclusive: Smartphone, MP3/MP4 players, Bluetooth devices (e.g. earbuds/headphones), portable DVD players, e-readers and portable gaming systems. Company issued mobile phones may be used by managers or supervisors in these areas only when such use is required for conducting company business. Personal mobile phones and all other personal mobile electronic devices are to be kept in the team member's locker. Personal phone calls and use of personal electronic devices shall be restricted to meal and break periods. Violation of this policy may result in disciplinary action up to and including termination.

7. Electronic Communications ²

Stericycle has established a policy relating to access and disclosure of electronic messages created, sent or received by team members using the Company's voicemail system, or an authorized internet email service. The Company intends to honor the policies set forth below, but reserves the right to modify, change or revoke them at any time as may be required under the circumstances. Use of the Company's voicemail/email equipment for electronic communications constitutes a team member's affirmation and acceptance of this Company policy. *A substantial portion of our business is transacted by telephone and over the wide area network. Therefore in order to maintain the efficiency of these systems non-business usage must be restricted. Phone and data lines must be kept open for business purposes. Accordingly, personal telephone calls and email should be infrequent and brief, and limited to urgent family matters.* Since the telephone, company-issued cell telephones and voicemail system are company property, Stericycle reserves the right to access voicemail messages at any time with no notice. Team members should have no expectation of privacy or confidentiality as to the content. Emergency calls to team members should be routed directly to the Supervisor so the team member can be located to accept the call.

Respondent contends that each of the challenged policies easily fits into Category 1 as a rule or policy that would not be reasonably interpreted as interfering with §7 rights and whose legitimate justification is clear from the rule or policy itself. Thus, no balancing is required and there is no need for any remand. As noted above, Respondent believes that the General Counsel will concede as much with respect to rules 4, 5, and 6 above. Regarding the other rules, Respondent's brief in support of exceptions and its answering brief to the exceptions filed by the General Counsel and the Charging Party fully explain why these rules/policies cannot be read to restrict §7 rights, as well as the legitimate justifications underlying the rules/policies. For the sake of brevity, Respondent will not repeat those arguments in this response.

² It is not clear whether the Board's Notice to Show Cause includes this particular policy, since it is currently controlled by *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

Because the policies in issue are clearly lawful under *Boeing*, no remand is necessary. However, in the event that the Board believes that one or more of these rules/policies requires further individualized scrutiny, Respondent urges that the entire case be remanded as opposed to a partial remand. Of course, it will not be necessary for the ALJ to revisit any issues unrelated to the challenged policies.

C. If Remand Is Warranted, The Board Should Remand The Entire Case.

As this case currently stands, it is a single proceeding with a single proposed remedy. The parties have expended considerable time and resources in litigating the case to this point. Severing the allegations at this stage will not promote efficiency or judicial economy. While it is conceivable that the Board could decide the non-policy issues more quickly if the allegations are severed, that will not resolve the entire dispute. What started as a single case will become two cases and potentially could result in Respondent having to post two separate Notices to Employees, as opposed to a single Notice. Moreover, in the event that Respondent or Charging Party wish to seek review in a federal court of appeals, it may be compelled to file and pursue two separate petitions for review, thereby increasing its litigation expenses.

Respondent further notes that ALJ Rosas is a very able and efficient judge who conducts streamlined proceedings and typically issues decisions in a prompt and timely manner. It is anticipated that should the Board remand this case to Judge Rosas, and should the record be reopened for further evidence, such evidence would be limited, and it is highly likely that Judge Rosas would issue a decision on remand before the end of the Board's fiscal year on September 30, 2019. This would permit the case to be returned to the Board and be ripe for decision in 2019.

Finally, Respondent observes that at least one of the unilateral change allegations is related to the policy issues. In particular, the allegation that Respondent unilaterally changed employees'

terms and conditions of employment by distributing an employee handbook to the Morgantown employees involves the very handbook that is the source of a number of the challenged rules and policies.

CONCLUSION

Respondent respectfully requests that the Board not sever certain allegations of the complaint and that it either (1) Retain the entire case on the ground that the challenged rules/policies clearly fall within Category 1 and thus require no individualized scrutiny, or (2) Remand the entire case to the ALJ with instructions to issue a Supplemental Decision addressing the policy and handbook issues in light of the Board's decision in *Boeing*. At that time, any aggrieved party should be permitted to file exceptions to any part of the Supplemental Decision. In that fashion, the Board will be able to decide the entire case in a single decision.

Dated this 29th day of January 2019.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing RESPONSE by electronic mail on the following parties:

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This the 29th day of January 2019.

s/ Charles P. Roberts III